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Insane Offenders, Dangerous Criminals, Criminal Responsibility and Security Measures:
The Positivist Criminology Network and the Reform of Criminal Law in Imperial Germany

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Abstract
The chapter studies the concept of the 'insane offender' from the angle of the positivist criminology network that formed around Franz von Liszt and the International Union of Penal Law and investigates its effect on the reform of criminal law in imperial Germany. The influence of criminological positivism on penal reform will be analyzed from the historical perspective of intertwined national and international arenas of positivist criminology and forensic psychology that produced criminological normativity and influenced attempts to change the German penal code. A main focus is on the major figure of German positivist criminology and the International Union of Criminal Law: Franz von Liszt, who served as an intellectual focal point in the formation of the concepts of 'insane offenders', 'dangerous criminals' and 'security measures' and who partly transformed them into juridical categories that were to serve the ideas of positivist criminology. Franz von Liszt and the positivist criminology network discussed the relation between insane and dangerous/habitual offenders and, more generally, between mental illness and crime with the intention to implement the resulting concepts and categories into criminal law. This chapter outlines these discussions on diminished criminal responsibility and related security measures and discusses to which extent they were rejected or integrated into the reform of the German penal code.

Keywords
Franz von Liszt, positivist criminology, International Union of Penal Law, insane offenders, criminal responsibility, reform of criminal law, German penal code

Summary: 1. Introduction. 2. From Criminalpsychologie to positivist criminology: medical and juridical discourses on criminal responsibility, insane offenders and the German penal code of 1871. 3. Controversial issues and basic stages 1893 – 1912. 4. Von Liszt' concept of insane offenders and criminal responsibility. 5. The search for compromise and reform at the national and international level 1902-1910. 6. The revision of the German penal code. 7. Conclusions. Bibliographical references

1. Introduction

This chapter studies the concept of the 'insane offender' from the angle of the positivist criminology network that formed around Franz von Liszt and the International Union of Criminal Law (*IKV = Internationale Kriminalistische Vereinigung*), and investigates its effect on the reform of criminal law in imperial Germany.[1] The interdisciplinary and international dimension of criminal law, juridical discourses and

[1] For this approach see Härter, K., "Zweckgedanke, Social Defence and Transnational Criminal Law: Franz von Liszt and the Network of Positivist Criminology (1871-1918)", *GLOSSAE. Journal of European Legal History* 17 (2020), pp. 150-175; for a global overview see Pifferi, M., *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries*, Oxford, 2016.

positivist criminology is of high relevance in order to better understand the purposes, results and failures of the revision of the German penal code with regard to the new ideas of positivist criminology and forensic psychology, in particular the implementation of the concept of diminished criminal responsibility (*verminderte Zurechnungsfähigkeit*) and related security measures such as preventive detention/indeterminate custody (*Sicherungsverwahrung*). Thus, the influence of criminological positivism on penal reform will be analyzed from the historical perspective of intertwined national and international arenas and knowledge regimes of positivist criminology and forensic psychology that produced criminological normativity and influenced attempts to change the German penal code.[2] This involves the relation between insane and dangerous/habitual offenders, and, more generally, between mental illness and crime, which criminology discussed, established and implemented in criminal law. With the 'insane offender', criminology established (or labelled) a new threat (or narrative thereof) to society that called for social defence through criminal punishment, security measures and medical treatment. As a consequence, this chapter also explores the entanglement of jurists and medical/psychological experts and the interdependences of psychological, criminological and juridical knowledge within the positivist criminology network in Germany and the *IKV*.[3] The main focus, however, will be on the major figure of German positivist criminology and the *IKV*: Franz von Liszt, who served as an intellectual focal point in the formation of ideas of insane offenders, dangerous criminals and security measures, and who partly transformed them into juridical concepts that would serve the ideas of positivist criminology as well as the reform of criminal law in imperial Germany.[4]

2. From *Criminalpsychologie* to positivist criminology: criminal responsibility, insane offenders and the German penal code of 1871

The juridical discourse on criminal responsibility, insane offenders and the importance of psychology for the criminal law already begun in the first half the 19th century. In the German-speaking countries, jurists, medical/psychological experts and

[2] On the interdependences of criminology, forensic psychology and the reform of criminal law see Wetzell, R.F., "The medicalization of criminal law reform in Imperial Germany", *Institutions of Confinement. Hospitals, Asylums, and Prisons in Western Europe and North America*, *1500–1950* (N. Finzsch, R. Jütte, eds.), Cambridge, 1996, pp. 275-284; Müller, Ch., *Verbrechensbekämpfung im Anstaltsstaat. Psychiatrie, Kriminologie und Strafrechtsreform in Deutschland 1871-1933*, Göttingen, 2004; Wetzell, R.F., "Penal reform in imperial Germany: Conflict and compromise", *The Limits of Criminological Positivism: The Movement for Criminal Law Reform in the* West, 1870-1940 (M. Pifferi, ed.), London / New York, 2022, pp. 42-73.

[3] On the history of German criminology see Wetzell, R.F., *Inventing the criminal. A history of German criminology 1880–1945*, Chapel Hill, 2000; Becker, P., *Verderbnis und Entartung. Eine Geschichte der Kriminologie des 19. Jahrhunderts als Diskurs und Praxis*, Göttingen, 2002; Galassi, S., *Kriminologie im Deutschen Kaiserreich. Geschichte einer gebrochenen Verwissenschaftlichung*, Stuttgart, 2004.

[4] On the importance of von Liszt and the state of research with regard to the topic of this paper see Mayenburg, D.v., "Die Rolle psychologischen Wissens in Strafrecht und Kriminologie bei Franz von Liszt", *Psychologie als Argument in der juristischen Literatur des Kaiserreichs* (M. Schmoeckel, ed.), Baden-Baden, 2009, pp. 103-133; Stäcker, T., *Die Franz von Liszt-Schule und ihre Auswirkungen auf die deutsche Strafrechtsentwicklung*, Baden-Baden, 2012; Koch, A. / Löhnig, M. (eds.), *Die Schule Franz von Liszts. Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts*, Tübingen, 2016; Koch, A., "Der unbekannte Franz v. Liszt (02.03.1851 – 21.06.1919) – Schlaglichter auf das Spätwerk anlässlich des 100. Todestages", *Zeitschrift für die gesamte Strafrechtswissenschaft (= ZSTW)* 131 (2019), pp. 451–483; Struck-Berghäuser, A.T., *Franz von Liszt und seine Gegner. Die Auswirkungen des „Schulenstreits" auf das heutige Sanktionen- und Strafvollzugsrecht*, Baden-Baden, 2020.

practitioners developed the so called *Criminalpsychologie* (criminal psychology) which showed growing interest in the relation of crime and disease and the psyche of individual perpetrators who had committed horrendous crimes in an abnormal mental state.[5] This was intertwined with the dogmatic issue of individual legal responsibility and free will and developed into an interdisciplinary discourse about the question of imputation (*Zurechnung*) and criminal responsibility. Various experts of *Criminalpsychologie* discussed the criteria of (ir)responsibility such as instinct, affect, passion, drunkenness and free will and the consequences regarding adjudication, punishability/impunity and the treatment of mentally ill or deficient delinquents.[6]

Since medical and psychological expertise gained in importance and resulted in the 'medicalization' of the criminal justice system, the problem arose how to regulate the judicial authority of medical experts in criminal procedure, particularly regarding the evaluation of the 'insanity' of offenders and the decision about their criminal responsibility.[7] Exploring the relation of crime and insanity, the German *Criminalpsychologie* encountered a fundamental problem: if crimes of insane persons could be considered the result of a disease or rather a behavior that resulted from mental incapacity, the concept of diminished criminal responsibility of insane perpetrators could potentially lead to a situation in which criminals would go unpunished or serve a rather lenient sentence. On the other hand, the mainstream of criminal jurisprudence upheld the concept of the free will as the basis principle of criminal responsibility that had been adopted in the particular penal codes of the German states and the imperial criminal code of 1871 (*Reichsstrafgesetzbuch*).[8] However, the *Reichsstrafgesetzbuch* also included 'mental incapacity' (*non compos mentis*) that could impair the free will and therefore preclude criminal responsibility at all: „*Eine strafbare Handlung ist nicht vorhanden, wenn der Thäter zur Zeit der Begehung der Handlung sich in einem Zustande von Bewusstlosigkeit oder krankhafter Störung der Geistesthätigkeit befand, durch welchen seine freie Willensbestimmung ausgeschlossen war*“.[9] Regarding mentally ill criminals this could lead to the consequence – as Franz von Liszt later concluded – that dangerous insane offenders would go unpunished. Therefore, 'insanity' had to be developed as a legal concept, informed by medical/psychological expertise.

The German penal code of 1871 and the criminal procedure code of 1877 (*Strafprozeßordnung*) regulated the role of experts (*Sachverständige*) and permitted the incarceration of defendants in public mental asylums based on an expert report about their

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[5] Greve, Y., *Verbrechen und Krankheit. Die Entdeckung der "Criminalpsychologie" im 19. Jahrhundert*, Köln, 2004.

[6] Gschwend, L., *Zur Geschichte der Lehre von der Zurechnungsfähigkeit. Ein Beitrag insbesondere zur Regelung im Schweizerischen Strafrecht*, Zürich, 1996; Greve, Y., "Die Unzurechnungsfähigkeit in der 'Criminalpsychologie' des 19. Jahrhunderts", *Unzurechnungsfähigkeiten. Diskursivierungen unfreier Bewußtseinszustände seit dem 18. Jahrhundert* (M. Niehaus, H.-W. Schmidt-Hannisa, eds.) Frankfurt am Main, 1998, pp. 107-132.

[7] Greve, Y., "Richter und Sachverständige: Der Kompetenzstreit über die Beurteilung der Unzurechnungsfähigkeit im Strafprozess des 19. Jahrhunderts", *Kriminalität und abweichendes Verhalten: Deutschland im 18. und 19. Jahrhundert* (H. Berding et al., eds), Göttingen, 1999, pp. 69–104; Franck, L., *Juristen und Sachverständige. Der Diskurs um die rechtliche Ausgestaltung des. Verfahrens mit Sachverständigen während der Zeit des Deutschen Reiches*, Baden-Baden, 2013.

[8] Jessen, W., *Ueber Zurechnungsfähigkeit. Denkschrift zum Entwurfe eines Strafgesetzbuches für den Norddeutschen Bund, Abschnitt IV. §. 46 und 47*, Kiel 1870; cf. Vormbaum, T., *Einführung in die moderne Strafrechtsgeschichte*, Berlin, 2009, pp. 121 ss.

[9] RStGB 1871 § 51, cf. Vormbaum, *Einführung*, p. 87.

mental state.[10] Thus, experts such as psychiatrists and psychologists gained in importance in the criminal justice system and expanded their role from assisting a defendant to supporting sentencing regarding appropriate punishments.[11] This also triggered the evolution of *Criminalpsychologie* into the (more or less new) discipline of forensic psychology. Concurrently, the emerging international positivist criminology network and the International Union of Criminal Law (*IKV*) founded by von Liszt, Prins and van Hamel in 1888/89 established a discursive framework for forensic psychology to interact with criminal jurisprudence. Particularly the topics of the 'insane offender' and criminal responsibility allowed medical experts, psychiatrists and psychologists to gain in importance in positivist criminology, as research has demonstrated for Belgium and Switzerland, often stressing the pivotal influence of criminal anthropology and the Italian school of criminology.[12] In the German positivist criminology network, too, protagonists of forensic psychology gained in importance, started to communicate with von Liszt and also participated in the *IKV*.

After presenting his concept of the *gesamte Strafrechtswissenschaft* and the *Zweckgedanke im Strafrecht* in the *Marburger Programm*, von Liszt developed an interest in psychological issues of criminal law.[13] In 1896 he gave a presentation at the congress of the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* in Berlin about the psychological foundations of criminal policy (*Kriminalpolitik*) and in the same year presented his ideas about criminal responsibility at the Third International Congress of Psychology in Munich. Both papers were immediately published in the *Zeitschrift für die gesamte Strafrechtswissenschaft* (*ZSTW*) and initiated a partly controversial debate, since von Liszt rejected the biological concepts of criminal anthropology (particularly Lombroso's) and proposed integrating criminal psychology into his concepts of *Zweckgedanke*, *Zweckstrafen* and his typology of offenders. The latter should be further developed regarding *Sicherungsstrafe* against incorrigible criminals and custody (*Verwahrung*) of dangerous mentally ill or deficient persons.[14]

Von Liszt started to communicate with the leading figures of forensic medicine in Germany, who participated in the positivist criminology network and in the evolving

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[10] RStPO 1877 §§ 72-93, here § 81: „Zur Vorbereitung eines Gutachtens über den Geisteszustand des Angeschuldigten kann das Gericht auf Antrag eines Sachverständigen nach Anhörung des Vertheidigers anordnen, daß der Angeschuldigte in eine öffentliche Irrenanstalt gebracht und dort beobachtet werde." Cf. Franck, L., *Juristen und Sachverständige*, pp. 106-118.

[11] Wetzell, R.F., "Psychiatry and criminal justice in modern Germany, 1880-1933", *Journal of European Studies* 39 (2009), pp. 270-289; Kühne, A., "Über die Anfänge der Forensischen und Kriminalpsychologie – Entwicklungslinien des ausgehenden 19. Jahrhunderts", *Psychologie als Argument in der juristischen Literatur des Kaiserreichs* (M. Schmoeckel, ed.), Baden-Baden, 2009, pp. 27-42; Wolffram, H., *Forensic Psychology in Germany. Witnessing Crime, 1880-1939*, Cham, 2018, pp. 1-19. It should be noted, that in this period psychology and psychiatry were not clearly separated disciplines and forensic psychology involves both, psychologists and psychiatrists.

[12] Cartuyvels, Y. / Cliquennois, G., "The Punishment of Mentally Ill Offenders in Belgium: Care as Legitimacy for Control", *Champ pénal/Penal field* [En ligne], Vol. XII | 2015, mis en ligne le 13 février 2019, consulté le 21 juillet 2022. URL : http://journals.openedition.org/champpenal/9307; DOI: https://doi.org/10.4000/champpenal.9307; Germann, U., *Psychiatrie und Strafjustiz. Entstehung, Praxis und Ausdifferenzierung der forensischen Psychiatrie in der deutschsprachigen Schweiz 1850–1950,* Zürich, 2004.

[13] Cf. Mayenburg, "Die Rolle psychologischen Wissens", pp. 110 ss.

[14] Liszt, F.v., "Die psychologischen Grundlagen der Kriminalpolitik", *ZSTW* 16 (1896), pp. 477-517; Liszt, F.v., "Die strafrechtliche Zurechnungsfähigkeit", *ZSTW* 17 (1897), pp. 70-84.

discourse about insane offenders and criminal responsibility.[15] A prime figure was the psychiatrist Richard von Krafft-Ebing (1840-1902), with whom he developed a friendship.[16] Krafft-Ebing had already published in 1872 the influential *Grundzüge der Criminalpsychologie*, and von Liszt managed to convince him to write reports in the *ZSTW*, which he did from 1882 to 1886. In 1889 Krafft-Ebing moved to the University of Wien but did not join the *IKV*.[17] Other influential experts were the psychiatrists Emil Kraepelin (1856-1926) and Anton Delbrück (1862-1944), both of whom worked in forensic psychopathology and became members of the *IKV*. Like von Liszt, they rejected the theories of Lombroso and maintained a critical distance to criminal anthropology but endorsed a reform of criminal law that followed the concepts of von Liszt and forensic psychology.[18] Regarding insane offenders and diminished criminal responsibility, however, Kraepelin developed a different opinion to von Liszt. While he advocated the idea that the medical/psychological expert should decide about diminished criminal responsibility in criminal trials, von Liszt firmly stated that only the judge should decide, whose verdict would "destroy the claim of the mad-doctor".[19] In contrast to Kraepelin, Delbrück supported von Liszt's ideas regarding diminished criminal responsibility and the special treatment of insane offenders through security measures in the German section of the *IKV*.[20]

The *IKV* also served as a platform to integrate a 'younger' generation of experts interested in forensic psychology, insane offenders, criminal responsibility and security measures into the international discourse of positivist criminology, supporting von Liszt and the attempts to revise the German penal code.[21] A close associate of von Liszt was the psychiatrist Gustav Aschaffenburg (1866-1944), who was influential in the shaping of forensic psychology and also a member of the *IKV*. He published a comprehensive interdisciplinary introduction to crime, criminology and criminal psychology in

[15] A comprehensive source is Gottschalk, A. (ed.), *Materialien zur Lehre von der verminderten Zurechnungsfähigkeit. Im Auftrage der kriminalpsychologischen Sektion des kriminalistischen Seminars der Universität Berlin*, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* (= *Mitteilungen der IKV*), Beilagen 11, Berlin, 1904.

[16] Mayenburg, "Die Rolle psychologischen Wissens", pp. 108 ss.

[17] Krafft-Ebing, R.v., *Grundzüge der Criminalpsychologie: auf Grundlage des Strafgesetzbuchs des deutschen Reichs für Aerzte und Juristen*, Erlangen, 1872, sec. ed. Stuttgart, 1882.

[18] Cf. Wetzell, R.F., "From Retributive Justice to Social Defense: Penal Reform in Fin-de-Siècle Germany", *Germany at the Fin de Siècle: Culture, Politics, and Ideas* (S. Marchand, D. Lindenfeld, eds.), Baton Rouge, 2004, pp. 59-77, here pp. 65-71.

[19] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", p. 78: "Das Schuldurteil des Richters vernichtet den Anspruch des Irrenarztes".

[20] Delbrück, A., "Über die vermindert Zurechnungsfähigen und deren Verpflegung in besonderen Anstalten. Vortrag bei der 8. Versammlung der deutschen Landesgruppe der I. K. V. Bremen 1902", *Mitteilungen der IKV* 10 (1902), pp. 628-648; Delbrück, A., "Die vermindert Zurechnungsfähigen. Referat bei der 9. Versammlung der deutschen Landesgruppe der I. K. V. Dresden 1903", *Mitteilungen der IKV* 11 (1904), pp. 539-602.

[21] On the history of the *IKV* see Bellmann, E., *Die Internationale Kriminalistische Vereinigung (1889-1933)*, Frankfurt am Main, 1994; Kesper-Biermann, S., "Die Internationale Kriminalistische Vereinigung. Zum Verhältnis von Wissenschaftsbeziehungen und Politik im Strafrecht 1889-1932", *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930). Deutschland im Vergleich. Fachtagung am Centre Marc Bloch, Deutsch-Französisches Forschungszentrum für Sozialwissenschaften in Berlin am 17. und 18. Februar 2005* (S. Kesper-Biermann, P. Overath, eds.), Berlin, 2006, pp. 85-107

Germany, which was translated into English in 1903 and internationally acclaimed.[22] Aschaffenburg and von Liszt founded and edited the *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* (1905-1936), the first criminological journal in Germany, which complemented the *ZSTW* and combined forensic psychology and criminal law reform.[23] The programmatic articles published by Aschaffenburg and von Liszt in the journals inaugural issue dealt with forensic psychology, the reform of criminal law and the protection of society against dangerous insane offenders and perpetrators with diminished responsibility. They claimed that forensic psychiatry/psychology (but not criminal anthropology) should play a leading role in criminal policy and the reform of criminal law, both of which should focus on insane and other offenders constituting a danger to the public, diminished criminal responsibility and appropriate punishment, security measures and medical treatment to defend society.[24] Aschaffenburg put this into positivist criminological practice and conducted empirical research about mentally ill persons constituting a danger to the public (*gemeingefährliche Geisteskranke*), which was funded by the Holtzendorff-Stiftung of the *IKV*. In 1912 he published his findings in the form of a comparative study on the securitization of society against dangerous insane offenders, in which he gave a survey of laws and treatment of insane offenders in the asylums and prisons of European countries.[25] Acclaimed by the *IKV* as an example of empirical positivist criminology, its impact on the subsequent attempts to revise the German penal code, however, seems to have been rather limited.[26]

All in all, the influence of non-juridical experts on the debates about insane offenders, criminal responsibility and the reform of criminal law was limited. They could only determine crucial arguments of the debate and suggest proposals for criminal practice concerning the evaluation of defendants through expert reports and the treatment of offenders through security measures and therapy. However, jurists and psychiatrists/psychologists competed regarding the function and authority of medical experts in criminal procedure, particularly concerning adjudication, punishment and security measures.[27]

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[22] Aschaffenburg, G., *Das Verbrechen und seine Bekämpfung. Einleitung in die Kriminalpsychologie für Mediziner, Juristen und Soziologen, ein Beitrag zur Reform der Strafgesetzgebung*, Heidelberg, 1903, Engl.: *Crime and its Repression*, Boston, 1913. About Aschaffenburg see Seifert, D., *Gustav Aschaffenburg als Kriminologe*, Freiburg, 1981; Schneider, H.J., “Kriminalpsychologie gestern und heute. Gustav Aschaffenburg als internationaler Kriminologe”, *Monatsschrift für Kriminologie und Strafrechtsreform* 87 (2004), pp. 168-191; Müller, *Verbrechensbekämpfung im Anstaltsstaat*, p. 79 ss.

[23] Berg, F., *Die Bekämpfung des Verbrechers als Sicherung des Volkes. Die „Monatsschrift für Kriminalpsychologie und Strafrechtsreform“ im Dritten Reich*, Wiesbaden, 2018, pp. 5-56.

[24] Aschaffenburg, G., “Kriminalpsychologie und Strafrechtsreform”, *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* 1 (1904/05), pp. 1-7; Liszt, F.v., “Der Schutz der Gesellschaft gegen gemeingefährliche Geisteskranke und vermindert Zurechnungsfähige”, *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* 1 (1904/1905), pp. 8-15.

[25] Aschaffenburg, G., *Die Sicherung der Gesellschaft gegen gemeingefährliche Geisteskranke. Ergebnisse einer im Auftrage der Holtzendorff-Stiftung gemachten Studienreise*, Berlin, 1912.

[26] Prüter-Schwarte, C., “Gustav Aschaffenburg und die Frage der verminderten Zurechnungsfähigkeit”, *Schriftenreihe der Deutschen Gesellschaft für Geschichte der Nervenheilkunde* 25 (2019), pp. 483-502.

[27] Similar conclusion: Mayenburg, “Die Rolle psychologischen Wissens”, pp. 130 s.; cf. Mayenburg, D.v., *Kriminologie und Strafrecht zwischen Kaiserreich und Nationalsozialismus. Hans von Hentig (1887-1974)*, Baden-Baden, 2006, pp. 205-209, on the conflict between jurists and psychiatrists.

Although von Liszt and most participants in the positivist criminology network sought the intellectual exchange with psychologist and psychiatrist, medical experts remained a minority of 4-5 % of the members of the *IKV,* whereas jurists constituted the majority (about 75 %) and dominated the discourse.[28] Among the latter was one of von Liszt's closest associates, Karl von Lilienthal, who was a co-editor of the *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, and a member of the commission to revise the penal code (*Reformkommission)*. He also assumed the role of a mediator between von Liszt and the so-called 'classical school'.[29] In a similar way, Wilhelm Kahl (1849–1932), another close associate of von Liszt and member of the *IKV*, and von Liszt's former student Gustav Radbruch (1878-1949) formulated proposals for a compromise regarding the implementation of diminished criminal responsibility and security measures in criminal law.[30] Overall, von Liszt and the German jurists of the *IKV* were hardly interested in the psychology of individual perpetrators and the intricacies of medical therapy. They primarily considered the questions of how mentally ill persons and insane offenders fitted into the typology of criminals, and how criminal responsibility and security measures could be defined through legal concepts and subsequently implemented in the German penal code and finally serve the purposes of criminal policy and social defence.

3. Controversial issues and basic stages 1893 – 1912

The discourse that developed in the positivist criminology network revolved around the legal – and only to some extent psychological – conceptualization of (dangerous) insane offenders, (diminished) criminal responsibility and appropriate security measures/medical treatment. The debate was characterized by different and controversial positions of the various judicial and medical experts as well as of positivist criminology and the classical juridical mainstream that were discussed and compromised on the national and international level. The main issues being debated were:

- the juridical, sociological and medical/psychological definition of 'insanity' and insane offenders, particularly with regard to such criteria as mental illness, moral defect, cognitive faculties, 'degeneration' and 'inferiority' and their impact for the commission of crimes and the evaluation of dangerousness;

- the relation of dangerous insane offenders to other types of morally insane, pathological, dangerous, habitual and incorrigible criminals;

- the legal definition of (diminished) criminal responsibility with regard to insane offenders and mentally ill or deficient persons who constituted a danger to the public;

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[28] Liste de membres/Mitgliederverzeichnisse, *Mitteilungen der IKV* 1-21 (1898-1914); Mayenburg, "Die Rolle psychologischen Wissens", p. 110; Mayenburg, *Kriminologie und Strafrecht*, pp. 122-126.

[29] Küper, W., "Der Heidelberger Strafrechtslehrer Karl von Lilienthal", *Semper Apertus Sechshundert Jahre Ruprecht-Karls-Universität Heidelberg 1386–1986* (W. Doerr et al., eds.), Berlin / Heidelberg, 1985, pp. 375-405; Lang, S., *Das strafrechtliche Lebenswerk Karl von Lilienthals*, Heidelberg 1986. On the so called *Schulenstreit* see Stäcker, *Die Franz von Liszt-Schule;* Struck-Berghäuser, *Franz von Liszt und seine Gegner*.

[30] Appel, K., *Der Strafrechtler und Strafrechtsreformer Wilhelm Kahl (1849–1932). „Die Wissenschaft kann rücksichtslos aus den als wahr erkannten Prinzipien die letzten Folgerungen ziehen. Der Gesetzgeber nicht"*, Berlin, 2014.

- the appropriate penal as well as preventive extra-judicial security measures serving the purpose of individual therapy of mentally ill persons/offenders and social defence too

- the role and authority of medical experts (psychiatrists/psychologists) in criminal procedure and punishment/security measures;

- the resulting need for reform and a revision of the German penal code concerning insane offenders and dangerous mentally ill persons as well as the implementation of diminished criminal responsibility and appropriate penal and extra-judicial measures.[31]

To implement their ideas about insane offenders, criminal responsibility and security measures as well as to develop an acceptable compromise, von Liszt and his close associates used the national as well as international interdisciplinary arenas and media through the following stages:

- in the fourth meeting of the *IKV* in Paris (1893) von Liszt and Garofalo gave lectures about the influence of the new ideas of criminology on criminal law, and Garofalo stated that crimes could result from 'moral insanity' but denied that emotions and instincts could be interpreted as symptoms of mental illness;[32]

- in 1896 von Liszt lectured about the psychological foundations of criminal policy in the meeting of the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre*;[33]
- at the International Congress of Psychology held in Munich in 1896, von Liszt gave a speech about criminal responsibility;[34]

- at the seventh congress of the *IKV* in Lisbon (1897), a discussion about the "notion de la responsabilité morale et pénale" started in which van Hamel and von Liszt took somewhat opposing positions;[35]

- at the *Deutsche Juristentag* in Berlin (1902), von Liszt gave a report about the revision of the German penal code in which he presented his concept of diminished criminal responsibility and a dual system of judicial penalties and extra-judicial measures;[36]

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[31] Wetzell, R.F., "About the concept of the 'dangerous individual' in turn-of-the-century penal reform: Debates on recidivism, état dangereux, indeterminate sentencing, and civil liberty in the International Union of Penal Law, 1889-1914", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 119-149 (available at http://www.glossae.eu); Wetzell, "Penal reform in imperial Germany", pp. 43-53; Stäcker, *Die Franz von Liszt-Schule*, pp. 270 ss., 385 ss.; Müller, *Verbrechensbekämpfung im Anstaltsstaat*, pp. 125 ss.; Galassi, *Kriminologie im Deutschen Kaiserreich,* pp. 299 ss., 385 ss.

[32] *Mitteilungen der IKV* 4 (1894), pp. 125-143 and 143-154.

[33] Published in 1896 as Liszt, "Die psychologischen Grundlagen der Kriminalpolitik".

[34] Published in 1897 as Liszt, "Die strafrechtliche Zurechnungsfähigkeit".

[35] *Mitteilungen der IKV* 6 (1897), pp. 468-492.

[36] Liszt, F.v., "Nach welchen Grundsätzen ist die Revision des Strafgesetzbuches in Aussicht zu nehmen?", *Strafrechtliche Aufsätze und Vorträge, Band 2, 1892 bis 1904*, Berlin, 1905, pp. 356-410.

- at the eighth meeting of the German section of the *IKV* in 1902, Anton Delbrück lectured about the treatment of perpetrators with diminished criminal responsibility in special institutions and the type of persons/perpetrators with diminished criminal responsibility, and at the ninth meeting in Dresden (1903), Liszt and Delbrück gave reports about dangerous insane offenders, criminal responsibility and the consequences for the reform of criminal law. To develop this issue, the subsequent discussion adopted basic principles (*Leitsätze*) and established a commission with von Liszt, Anton Delbrück, *Medizinalrat* Friedrich Leppmann (a prison doctor) and *Landgerichtsdirektor* Albert Weingart (a judicial director) as members; the latter had also published an article in the *ZSTW* about diminished criminal responsibility.[37] The commission was also to conduct a survey of relevant materials (opinions, laws, provisions, data) about the doctrine of diminished criminal responsibility. This was published in 1904 on behalf of the *Kriminalpsychologische Sektion des Kriminalistischen Seminars der Universität Berlin* as a special issue of the Bulletin of the *IKV* that mostly compiled quotations from the main protagonists of the debate;[38]

- in 1904 the *Deutsche Juristentag* at Innsbruck staged a special section on the penal treatment of mentally inferior persons (*geistig Minderwertige*) in which Wilhelm Kahl and Friedrich Leppmann gave reports and the psychiatrist Ernst Kraepelin, like them also member of *IKV*, engaged in an intense discussion about diminished criminal responsibility;[39]

- based on the guiding principles of 1903, in January 1904 von Liszt published a preliminary draft of a special law about the custody of dangerous mentally ill or deficient persons and persons with diminished criminal responsibility. With the consent of Delbrück and Weingart, he presented this in a slightly modified and extended version with the consent of Delbrück and Weingart at the meeting of the German section of the *IKV* in 1904 in Stuttgart; the presentation was immediately published in the *Mitteilungen* of the *IKV* of 1904;[40]

- in December 1904 von Liszt, van Hamel, Prins and von Mayr attended the meeting of the *Société Générale des Prisons*, in which French members of the *IKV* criticized the German approach to insane offenders and criminal responsibility, stating that insane offenders should not receive a criminal punishment but only a special custody/treatment in mental asylums. They also rejected preventive confinement of mentally ill or deficient persons as impairing the rule of law;[41]

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[37] Weingart, A., "Die verminderte Zurechnungsfahigkeit", *ZStW* 19 (1899), pp. 133-148.

[38] Delbrück, A., "Über die vermindert Zurechnungsfähigen", pp. 628-648; Delbrück, A., "Die vermindert Zurechnungsfähigen", pp. 539-602; Gottschalk (ed.), *Materialien zur Lehre von der verminderten Zurechnungsfähigkeit*.

[39] Cf. Wetzell, *Inventing the criminal*, pp. 90-96

[40] Liszt, F.v., "Entwurf eines Gesetzes betreffend die Verwahrung gemeingefährlicher Geisteskranker und vermindert Zurechnungsfähiger", *Aerztliche Sachverständigen-Zeitung* 10 (1904), pp. 25-28, 49-50; Liszt, F.v., "Entwurf eines Gesetzes betreffend die Verwahrung gemeingefährlicher Geisteskranker und gemindert Zurechnungsfähiger", *Mitteilungen der IKV* 11 (1904), pp. 637-658, reprinted Liszt, F.v., *Strafrechtliche Aufsätze und Vorträge, Band 2, 1892 bis 1904*, Berlin, 1905, pp. 499-519; "X. Landesversammlung der Landesgruppe Deutsches Reich, Stuttgart, 25.-28. Mai 1904", *Mitteilungen der IKV* 12 (1905), pp. 265-286.

[41] See *Revue pénitentiaire et de droit penal: bulletin de la Société générale des prisons et de legislation criminelle* 29 (1905), pp. 39 ss.

- in 1905 von Liszt presented theses of his draft proposal about insane offenders, criminal responsibility and security measures at the X. International Conference of the *IKV* in Hamburg, which after a controversial discussion led to a compromise;[42]

- and finally, at its congress in Brussels (1910), the *IKV* debated the notion of 'dangerousness' and appropriate security measures. In his statement, von Liszt briefly referred to his proposal of indeterminate custody for insane offenders while their *état dangereux* continued.[43]

4. Von Liszt's concept of insane offenders and criminal responsibility

As already briefly outlined, von Liszt approached the issues of insane offenders, criminal responsibility and security measures in several presentations, articles and proposals for the reform of criminal law in which he tried to use insights of positivist criminology and forensic psychology, but ultimately remained in his juridical concepts of *Zweckgedanke*, *Zweckstrafe*, *Kriminalpolitik*, dangerous offenders (*gemeingefährliche Verbreche*r) and social defence.[44] Rejecting Lombroso's theories and the anthropological/biological differentiation of criminals and referring to the criteria of dangerousness and social defence, von Liszt distinguished two phenotypes of insane offenders:

- *vermindert Unzurechnungsfähige*: offenders with diminished criminal responsibility because of their mental state, insanity or inferiority;

- *gemeingefährliche Geisteskranke*: mentally ill or deficient persons who posed a danger to public security.

Both phenotypes were not clearly defined, showed variations and overlaps.[45] According to von Liszt, mentally ill persons who had not committed any offence as well as insane offenders with diminished criminal responsibility could constitute future dangers to society and were to be treated with preventive security measures. As a consequence, it was not the crime that constituted the principal factor justifying a measure of the criminal justice system. Instead, the correlation between insanity and criminality was based on the criteria of dangerousness and habituality corresponding to morally or mentally disordered, pathological and/or abnormal insane offenders.[46] Von Liszt characterized dangerous mentally ill persons as well as habitual criminals as 'deficient', 'inferior' (*minderwertig*) and 'degenerate' – *geistig Minderwertige* – and were therefore

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[42] "Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung", *Mitteilungen der IKV* 13 (1906), pp. 470 ss.; cf. Kitzinger, F., *Die internationale kriminalistische Vereinigung. Betrachtungen über ihr Wesen und ihre bisherige Wirksamkeit*, München, 1905, pp. 137-141; Bellmann, *Internationale Kriminalistische Vereinigung*, pp. 112-114.

[43] Report of v. Liszt, *Mitteilungen der IKV* 17 (1910), pp. 423-449, here p. 435.

[44] Liszt, "Die psychologischen Grundlagen der Kriminalpolitik"; Liszt, "Die strafrechtliche Zurechnungsfähigkeit"; Liszt, F.v., "Die strafrechtliche Zurechnungsfähigkeit. Eine Replik von Prof. v. Liszt", *ZSTW* 18 (1898), pp. 229–266; Liszt, "Entwurf eines Gesetzes"; Liszt, "Der Schutz der Gesellschaft". Cf. Mayenburg, "Die Rolle psychologischen Wissens", pp. 123-125; Struck-Berghäuser, *Franz von Liszt und seine Gegner*, pp. 146-148, 270-272; Härter, "Zweckgedanke, Social Defence and Transnational Criminal Law".

[45] A more elaborated but basically corresponding typology presented Aschaffenburg, *Die Sicherung der Gesellschaft*, pp. 15-20.

[46] See in general Wetzell, "About the concept of the 'dangerous individual'".

considered to be in a permanent state of moral insanity. These ideas had been developed by other German forensic psychiatrists and criminologist too but had also provoked criticism.[47] According to von Liszt, every individual who could be expected to commit crimes due to his or her mental insanity or mental inferiority was to be classified as a danger to society (*„dasjenige Individuum, von welchem, und zwar infolge seiner Geisteskrankheit oder seiner geistigen Minderwertigkeit, die Begehung strafbarer Handlungen zu besorgen ist"*), since moral as well as mental insanity induced a criminal inclination (*„die auf die geistige Beschaffenheit zurückzuführende verbrecherische Neigung"*).[48]

To von Liszt, moral insanity based on inferiority, degeneration, dangerousness and incorrigibility also applied to the type of the dangerous habitual criminal: *gemeingefährliche Gewohnheitsverbrecher*.[49] Thus, the conjunction of mental and moral insanity connected mental illness with criminal habituality and insane offenders with habitual criminals. Von Liszt and many criminologists saw beggars, vagrants, social parasites, and to some extent professional, transnationally operating and even political criminals (particularly anarchists) as belonging to the type of the habitual criminal and thus could be classified as morally insane and incorrigible offenders.[50] Through moral insanity and *geistige Minderwertigkeit* (mental inferiority) dangerous insane offenders were linked with habitual criminals with a deviant lifestyle such as beggars, vagrants, gypsies, prostitutes and incorrigible recidivists, accentuating the question of diminished criminal responsibility. If criminal responsibility was further based on the free will and the principle of mental incapacity, the consequence was that not only insane offenders and dangerous mentally ill persons but also morally deficient habitual criminals could not be fully held legally accountable. According to von Liszt, however, neither free will nor mental/moral insanity, instincts/impulses, emotions and individual motives affecting the mental capacity of a (potential) criminal were sufficient to determine diminished criminal responsibility and the appropriate criminal sanctions. Consequently, diminished criminal responsibility and the resulting measures should be primarily determined through moral and mental insanity in relation to the phenotypes of mentally ill persons, the typology of offenders and their dangerousness and the purpose to protect society through appropriate punishments, security measures and medical treatments.

His fundamental conclusion was that the paragraph of the penal code that granted impunity in case of mental incapacity (*non compos mentis* § 51 RStGB), should be revised in order to implement the principle of diminished criminal responsibility and a dual system of measures to protect society against dangerous insane offenders, dangerous mentally ill persons and dangerous habitual criminals. This included the mitigation of criminal punishment for offenders – insane or not – if they were evaluated to be neither

[47] Cf. Wetzell, *Inventing the criminal*, pp. 19-28; Galassi, *Kriminologie im Deutschen Kaiserreich,* pp.226-231; Müller, *Verbrechensbekämpfung im Anstaltsstaat*, pp. 66-72; Berg, *Bekämpfung des Verbrechers*, pp. 10-20.

[48] Liszt, "Entwurf eines Gesetzes", pp. 499, 506.

[49] Cf. Härter, "Zweckgedanke, Social Defence and Transnational Criminal Law", pp. 159 ss.

[50] Cf. Althammer, B., "Pathologische Vagabunden. Psychiatrische Grenzziehungen um 1900", *Geschichte und Gesellschaft* 39 (2013) 3, pp. 306-337; Hahn, J., "Anarchisten, Attentäter und Revolutionäre: Zur Psychopathologisierung „politischer Verbrecher" zwischen 1880 und 1920 / Anarchists, Assassins and Revolutionaries: The Psychopathologization of „Political Criminals" between 1880 and 1920, *Medizinhistorisches Journal* 51 (2016), pp. 40-71; for Belgium cf. Cartuyvels / Cliquennois, "The Punishment of Mentally Ill Offenders".

dangerous nor habitual and could be rehabilitated through penal sanctions. Offenders with diminished criminal responsibility who had committed a crime were to be punished appropriately, but if they were evaluated as dangerous and if it could be reasonably expected that they posed a future danger to society, subsequent security measures – such as preventive detention/indeterminate custody (*Verwahrung*) – should be imposed. This also applied to mentally insane offenders who could not be cured through medical therapy. Hence, von Liszt argued that for insane offenders with diminished responsibility it should be possible, but not mandatory, to mitigate criminal punishment. Instead, punishment and additional subsequent security measures could be imposed if they were classified as dangerous. Based on the decision of a preliminary criminal court, the report of a medical expert (psychiatrist or psychologist) and the legal incapacitation (*Entmündigung*) by a guardianship court with shared jurisdiction, dangerous insane offenders with diminished responsibility as well as dangerous mentally ill persons were to be taken into custody and institutionalized in mental institutions/asylums for treatment them with medical and disciplinary measures (including forced labor and even sterilization). This included dangerous mentally ill or deficient persons who had not committed a crime but were to be legally incapacitated and institutionalized as a preventive security measure. In both cases, custody and therapy could be indeterminate and continue as long as the concerned inmate/patient was evaluated as still dangerous; release was to be possible only in the case of a successful therapy and after being evaluated as no longer dangerous by a judge based on a medical expert's report. Hence, von Liszt concluded, that *gemeingefährliche Geisteskranke* as well as *gemeingefährliche Gewohnheitsverbrecher* were to be treated with additional preventive and indeterminate security measures, since both types constituted a permanent danger to society and could not be rehabilitated through criminal punishment.[51] Consequently, von Liszt discarded the differentiation between *Sicherungsstrafe* (protective punishment) of incorrigible criminals and *Verwahrung* (custody) of dangerous mentally ill persons: *"Die Unterscheidung zwischen der Sicherungsstrafe gegen unverbesserliche Verbrecher und der Verwahrung gemeingefährlicher Geisteskranker ist nicht nur praktisch im wesentlichen undurchführbar, sie ist auch grundsätzlich zu verwerfen"*.[52] Society ought to be protected against insane offenders, mentally ill or deficient persons and habitual criminals through various indeterminate and preventive security measures ranging from special prevention through therapy and disciplining, over institutionalization and custody to neutralization and elimination (*Unschädlichmachung*) as long as they constituted a common danger.

However, von Liszt did not develop a cohesive legal concept of insane offenders and diminished criminal responsibility and left several issues unsolved. Although the dangerousness of the individual constituted the fundamental legal principle, he considered a definition through criminal law unnecessary.[53] Moreover, he did not define the grades of dangerousness in relation to the grades of insanity; dangerousness was not only a consequence of crimes committed or of recidivism but also determined by the *'Gesinnung'* (attitude) of a person as a condition or state – *état dangereux du délinquant*

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[51] Liszt, "Die strafrechtliche Zurechnungsfähigkeit"; Liszt, "Entwurf eines Gesetzes"; Liszt, "Verhandlungen der X. Internationalen Versammlung", *Mitteilungen der IKV* 13 (1906), pp. 470-489.

[52] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", p. 82.

[53] Liszt, "Entwurf eines Gesetzes", p. 506: "Die Gemeingefährlichkeit des Individuums bildet daher den Fundamenalbegriff des Gesetzes. Einer gesetzlichen Bestimmungen dieses Begriffs bedarf es wohl nicht".

– that could generate criminal activities, but was not legally defined.[54] Likewise, the relation between mental illness, mental inferiority, moral insanity and habituality remained hazy, as did the legal distinction between *geistig Minderwertige*, *gemeingefährliche Geisteskranke* and *gemeingefährliche Gewohnheitsverbrecher*. At the meeting of the German section of the *IK*V in 1904, von Liszt rejected any definition of diminished responsibility, and later only conceded that instead of defining it through criminal law, criminology should develop a scientific concept of it. His contribution consisted in enumerating various examples of 'diminished/inferior criminals' with a criminal disposition or lacking resilience against crime. like, for instance, beggars, vagrants, prostitutes and idlers, inferior and degenerates, alcoholics and drug addicts, 'social neurasthenics', *Desequilibrierte*, epileptics, homosexuals, 'hysterical' women or sex murderers (*Lustmörder*). In the 1905 meeting of the IKV, von Liszt presented a more systematic typology that compromised 1) insane offenders with mental, intellectual and moral deficiencies, 2) neurotics, including epileptics and hysterical kleptomaniac women, 3) alcohol and drug addicts, 4) people in specific biological phases of life (puberty, climacterium, senility), 5) sexual perverts. Not included were dangerous mentally ill persons (*gemeingefährliche Geisteskranke*): Since they were not offenders, judges did not have to consider the question of diminished criminal responsibility but only of their dangerousness. Von Liszt was thus still conflating mental and moral insanity, used psychological, social and legal criteria or rather narratives, but finally claimed that the participation of medical experts should be restricted to an expert report. The judge was to have the final authority to decide on the diminished responsibility of an offender, his or her punishment and possible security measures.[55]

Von Liszt therefore argued that the role and authority of judges and medical experts in criminal procedure, adjudication, sentencing and the execution of the measures, necessitated a considerable revision of the criminal procedure code. The procedure of legal incapacitation through a guardianship also required a revision of the civil law code.[56] Finally, the German penal code had to be revised to implement the concept of diminished criminal responsibility and an appropriate legal system of criminal penalties and security measures that could be subsequent to punishment, preventive, and/or indefinite depending on the dangerousness of insane offenders and mentally deficient persons. It was not surprising that von Liszt's articles and arguments caused many objections from the classical school of jurisprudence, for instance from Karl von Birkmeyer, Adolf Merkel, Heinrich Lammasch and Carl Stooss. They argued that von Liszt wanted to abolish the principle of guilt and destroy the foundations of criminal law.[57] In a similar vein, some members and national sections of the *IKV* (particularly from France and Russia) criticized that von Liszt's proposals impaired the rule of law and liberal criminal law. In the national and international arenas, therefore, controversial debates began in which von Liszt and

[54] Härter, "Zweckgedanke, Social Defence and Transnational Criminal Law", p. 163; Wetzell, "About the concept of the 'dangerous individual'".

[55] Liszt, "Entwurf eines Gesetzes"; Liszt, "Verhandlungen der X. Internationalen Versammlung", *Mitteilungen der IKV* 13 (1906), pp. 474-478; cf. Struck-Berghäuser, *Franz von Liszt und seine Gegner*, pp. 385-388.

[56] Cf. Struck-Berghäuser, *Franz von Liszt und seine Gegner*, pp. 396 ss.

[57] Birkmeyer, K.v., *Was lässt von Liszt vom Strafrecht übrig? Eine Warnung vor der modernen Richtung im Strafrecht*, München, 1907; Schäfer, F.L., Carl Stooss (1849–1934) – Eine Geschichte der Strafrechtskodifikation in drei Staaten, *Jahrbuch der Juristischen Zeitgeschichte* 14 (2013), pp. 312-352, p. 348; Struck-Berghäuser, *Franz von Liszt und seine Gegner*, pp. 397-403.

the positivist criminology network attempted to reach compromises and solutions which had a chance of being implemented in the reform of German criminal law.[58]

5. The search for compromise and reform at the national and international level 1902-1910

As early as 1902, von Liszt had been appointed by the *Reichsjustizamt* (Office for National Justice) as a member of the *Wissenschaftliches Komitee zur Vorbereitung der Strafrechtsreform* and had proposed the revision of § 51 of the German penal code with regard to the implementation of diminished criminal responsibility and additional indeterminate custody (*Verwahrung*) for dangerous insane offenders: *„Ist die Zurechnungsfähigkeit des Beschuldigten nicht aufgehoben, sondern nur gemindert, so kann der Richter die angedrohte Strafe bis unter das angedrohte Mindestmaß mildern. Erscheint der vermindert Zurechnungsfähige als gemeingefährlich, so ist in dem Urteil die Ueberweisung in eine Heil- oder Pflegeanstalt nach verbüßter Strafe zu verfügen. "*[59] The *Deutsche Juristentag* in Berlin in 1902 as well as the reform committee and the *Reichsjustizamt*, however, rejected his proposal, and after 1906, von Liszt was no longer called to serve on as a member of the subsequent reform commissions.[60]

The next stage of a comprise was reached at the ninth meeting of the German section of the *IKV* in Dresden (1903) that unanimously adopted basic principles (*Leitsätze*) which mainly supported von Liszt's ideas. Diminished criminal responsibility was to be introduced in the penal code to allow the mitigation of punishment particularly for insane offenders. Based on the decision of a judge, such offenders could be detained in special institutions (*Verwahrungsanstalten*), such as mental and detoxification asylums/sanatoriums. Insane and inferior offenders as well as other persons with diminished criminal responsibility who constituted a danger to the public could be put in indeterminate custody (*Verwahrung)* after serving a sentence or even before committing a crime as long as they were dangerous. During custody they should receive medical therapy and could be released by a judge after a positive evaluation by experts.[61]

Based on these agreed principles and responding to the criticism, von Liszt gave up the idea of a revision of the penal code, and with the support of Anton Delbrück and Albert Weingart formulated a draft proposal on a special law about dangerous mentally ill persons, insane offenders, diminished criminal responsibility and security measures (*Entwurf eines Gesetzes betreffend die Verwahrung gemeingefährlicher Geisteskranker und gemindert Zurechnungsfähiger*). He published a first version in the *Aerztliche Sachverständigen-Zeitung* – clearly aiming at the psychiatrists and psychologists – and at the meeting of the German section of the *IKV* in 1904 presented an elaborated version,

[58] See Galassi, *Kriminologie im Deutschen Kaiserreich*, pp. 360-367; Bellmann, *Internationale Kriminalistische Vereinigung*, pp. 112-114; Wetzell, *Inventing the criminal*, pp. 83-96.

[59] Liszt, quoted in: Gottschalk (ed.), *Materialien zur Lehre von der verminderten Zurechnungsfähigkeit,* p. 99, also in: *Strafrechtliche Aufsätze und Vorträge,* Bd. 2, S. 356 (406 f.); cf. Struck-Berghäuser, *Franz von Liszt und seine Gegner*, p. 397.

[60] Cf. Wetzell, "Penal reform in imperial Germany", pp. 59 ss.

[61] *Mitteilungen der IKV* 11 (1904), pp. 539-602; *Deutsche Juristenzeitung* IX (1904), pp. 632-634; Liszt, "Entwurf eines Gesetzes", pp. 499 ss.; Kitzinger, *internationale kriminalistische Vereinigung*, pp. 137 ss.

which comprised detailed explanatory remarks.[62] This draft also included proposals for the revision of the respective paragraph of the penal code by Hermann Seuffert und van Calker, as well as relevant examples from Swiss and Norwegian criminal law. To facilitate a compromise, von Liszt even requested Friedrich Oetker, a prominent figure of the classical school of criminal jurisprudence, to provide an alternative draft which was published in 1905 in the *Mitteilungen* of the *IKV*.[63] Responding to the debate, von Liszt's draft law now defined diminished criminal responsibility of insane offenders as "mental disorder significantly diminishing the free will" (*„bei denen im Augenblick der Begehung der Tat durch Bewußtlosigkeit oder geistige Störung die freie Willensbestimmung nicht ausgeschlossen, aber erheblich vermindert worden"*). The draft proposal thus kept free will as the main reference of criminal responsibility, but instead of calling for impunity in case of mental incapacity, insane offenders were to receive a more lenient punishment and additional medical treatment.

The draft law gave a more precise outline of the criminal procedure, the competences of the courts, judges and medical experts involved, and the dual system of judicial punishment and security measures. The essential new feature was custody/institutionalization and legal incapacitation – *Verwahrung und Entmündigung*. If, based on the evaluation conducted by an expert psychiatrist, a criminal court found that an insane offender and/or perpetrator with diminished responsibility posed a danger to the public, it was to be able to order preliminary custody/institutionalization in a prison or asylum and to initiate the legal incapacitation procedure by a guardianship court. If the court decided on legal incapacitation due to dangerousness, mental insanity or diminished responsibility, it had to order custody in a mental institution/asylum for as long as the legal incapacitation persisted. Legal incapacitation and custody/preventive detention could be imposed after, during and even before criminal punishment. Thus, it was possible to impose security measures (*Sicherheitsmaßregeln*) not only on insane offenders and perpetrators with diminished criminal responsibility but also for *gemeingefährliche Geisteskranke*: mentally ill persons whom courts and medical experts evaluated as dangerous to the public and had not committed a crime. Von Liszt justified this authority with the necessity to defend society against all dangerous insane persons (offenders or not) and against perpetrators with diminished criminal responsibility: *"Schutz der Gesellschaft gegenüber den gemeingefährlichen Geisteskranken und vermindert Zurechnungsfähigen"*.[64] To keep the requirements (or semblance) of the rule of law, von Liszt included, first, the participation of the public prosecutor (*Staatsanwaltschaft*); second, a right of action against decisions by the persons concerned; third, medical treatment and release after a positive evaluation; and, fourth, the participation of psychiatrists, directors of mental asylums and, to some extent, of family members.

Despite these concessions, the draft retained the possibility of indefinitely institutionalizing/incarcerating *gemeingefährliche Geisteskranke* who had not been found

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[62] Liszt, "Entwurf eines Gesetzes"; cf. Struck-Berghäuser, *Franz von Liszt und seine Gegner,* pp. 394-396.

[63] Oetker, F., "Entwurf eines Reichsgesetzes, betreffend die vorläufige Verwahrung und die Internierung gemeingefährlicher Geisteskranker und die Bestrafung, vorläufige Verwahrung und Internierung im Falle geminderter Schuldfähigkeit", *Mitteilungen der IKV* 12 (1905), pp. 58–75; "X. Landesversammlung der Landesgruppe Deutsches Reich, Stuttgart, 25.-28. Mai 1904", *Mitteilungen der IKV* 12 (1905), pp. 265-286.

[64] Liszt, "Entwurf eines Gesetzes", p. 506.

guilty or had not committed any crime, and thus still violated a basic principle of liberal criminal law. Regarding the reform of criminal law, moreover, the draft rather complicated things: A new special law would establish an unusual, mixed jurisdiction and required the revision of the concerned provisions of the penal code, of the criminal procedural code, and – regarding the incapacitation procedure – of the civil law and procedural code. Therefore, the resolution of the German section of the *IKV* that unanimously approved the draft only instructed the board to request all legislating bodies of the German Empire to conceive a criminal law based on the draft proposal. However, this was never put into practice.[65]

In the next step, von Liszt presented the draft proposal in 1905 at the international conference of the *IKV* in Hamburg.[66] It was complemented by a presentation of Adolphe Prins on dangerous offenders/classes, whom he – in contrast to von Liszt's category of *gemeingefährliche Geisteskranke* – primarily defined through the criterion of recidivism.[67] Von Liszt in his presentation claimed that, although a compromise between criminologists and classical jurisprudence had already been reached in Germany, he nevertheless had considered the criticism of the French criminologist expressed earlier at the meeting of the *Société Générale* des *Prisons* in December 1904.[68] He summarized his proposal in the form of four theses:

1) For dangerous inferior/insane persons with diminished responsibility (*„Minderwertige mit verminderter Zurechnungsfähigkeit aufgrund innerer Ursachen"*), legislation should stipulate appropriate security measures irrespective of whether the persons had committed a crime or not.

2) For inferior/insane offenders – dangerous or not – who had committed a crime, punishment should be obligatory and subsequent security measures, such as custody/institutionalization in mental asylums, possible; considering the critique of the French criminologists, the mitigation of penalties for insane offenders should be requested irrespective of mitigating circumstances ("*Für die verbrecherischen Minderwertigen, mögen sie gefährlich sein oder nicht, soll Strafe eintreten. Allerdings soll eine Milderung der Strafe verlangt werden, und zwar mit Rücksicht auf die Franzosen, eine besondere Milderung, unabhängig von der gesetzlichen Zulassung mildernder Umstände*").

[65] On the presentation, discussion and resolution see "X. Landesversammlung der Landesgruppe Deutsches Reich, Stuttgart, 25.-28. Mai 1904", *Mitteilungen der IKV* 12 (1905), pp. 265-286; *Deutsche Juristenzeitung* IX (1904), pp. 632-634.

[66] "Verhandlungen der X. Internationalen Versammlung der Internationalen Kriminalistischen Vereinigung", *Mitteilungen der IKV* 13 (1906), pp. 470-489; Spielmann, W., "Internationale Versammlung der Internationalen Kriminalistischen Vereinigung in Hamburg vom 11.-15. September 1905", *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* 2 (1905), pp. 580-585, here 583 s.. Cf. Bellmann, *Internationale Kriminalistische Vereinigung*, p. 112 s.; Wetzell, "About the concept of the 'dangerous individual'", pp. 132-134.

[67] On Prins' approach see: Cartuyvels, Y., "Adolphe Prins and social defence in Belgium: The reform in the service of maintaining social order", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 176-210 (available at http://www.glossae.eu).

[68] See *Revue pénitentiaire et de droit penal: bulletin de la Société générale des prisons et de legislation criminelle* 29 (1905), pp. 39 ss.

3) Regarding insane offenders, a criminal court should decide on preliminary security measures, and a civil court (guardianship court) in matters of legal incapacitation as well as on subsequent measures and institutionalization.

4) The civil court should also decide on the revocation of guardianship and the release of insane offenders or dangerous inferior persons.[69]

In comparison with the *Leitsätze* and the draft proposal that the German section of the IKV had adopted in 1903 and 1904 respectively, some of the theses presented in 1905 seemed relatively vague and did provoke a controversial discussion. Adolphe Prins, who articulated the French position, particularly rejected the second thesis and the mitigation of punishment for insane offenders with diminished criminal responsibility. He demanded only a special treatment: "*pour les défectueux délinquants dangereux ou non, il y a liu d'instituer un traitement special*".[70] Many participants and even Gustav Aschaffenburg, who supported preventive measures against non-criminal *gemeingefährliche Geisteskranke*, agreed with this opinion and opposed criminal punishment (mitigated or not) for insane offenders with diminished criminal responsibility. Van Hamel rejected distinguishing between responsible and irresponsible offenders and suggested classifying offenders according to their grade of insanity, degeneration, inferiority and dangerousness that would justify an appropriate treatment (including punishment as well as security measures). Some participants suggested introducing 'special' punishment or treatment instead of (criminal) punishment; others demanded to more precisely define criminal responsibility as a legal concept and not as a psychological matter of mental inferiority.[71] The debate ended with a comprise. The first thesis was adopted, but left the concrete legal form of the security measures to the legislator: "*Pour les défectueux (à responsabilité atténuée par influences d'ordre intrinsèque), délinquants ou non, qui sont dangereux pour eux-mêmes, pour leur milieu ou pour la société, le législateur doit décréter des mesures de sauvegarde (surveillance spéciale, asiles de sûreté et autres*". The second thesis was modified and introduced the vague and not further defined possibility of 'specific punishment' or 'specific treatment': "*pour les défectueux délinquants, dangereux ou non, il y a lieu d'instituer une peine spéciale ou un traitement spécial*".[72]

Theses three and four were not put to a vote, and the *IVK* avoided the question of jurisdiction and judicial authority in cases of dangerous insane/inferior mentally ill persons or offenders. It was not until the conference of 1910 and after interventions by Aschaffenburg, van Hamel, Prins and Wladimir Nabokoff (chairman of the Russian section) that the *IKV* finally adopted the resolution that the "law should establish special measures of social security against delinquents who are dangerous because of either their

[69] Liszt, "Verhandlungen der X. Internationalen Versammlung", *Mitteilungen der IKV* 13 (1906), pp. 479 ss.

[70] "Verhandlungen der X. Internationalen Versammlung", *Mitteilungen der IKV* 13 (1906), p. 496; cf. Wetzell, "About the concept of the 'dangerous individual'", pp. 132-134.

[71] "Verhandlungen der X. Internationalen Versammlung", *Mitteilungen der IKV* 13 (1906), p. 497-544; for the opinion of Aschaffenburg see Prüter-Schwarte, "Gustav Aschaffenburg und die Frage der verminderten Zurechnungsfähigkeit", pp. 495-497.

[72] "Verhandlungen der X. Internationalen Versammlung", *Mitteilungen der IKV* 13 (1906), p. 545; quoted French version: Van der Landen, D., "Résolutions votées lors des congrès de l'Union internationale de droit pénal (Ordre chronologique)", *Revue internationale de droit pénal / International Review of Penal Law* 61 (1990) 61, pp. 341-353, quotation p. 351.

legal relapses, their habits of life such as the law may define as dangerous, or their antecedents, hereditary or personal, manifested by a crime or offense that the law shall determine".[73] Hence, the *IKV* only accepted security measures against dangerous insane offenders and not against *gemeingefährliche Geisteskranke* who had not committed a crime.

The discussions of the *IKV* showed that international criminology had difficulties to define concise legal concepts of 'insane/inferior offenders', 'diminished criminal responsibility', 'dangerousness' and a consistent system of penal sanctions, security measures and medical treatment.[74] Moreover, they demonstrated that the criminological discussions had partly failed in integrating the empirical research findings of medical experts and practitioners. Finally, national differences became obvious, particularly regarding the 'système allemand' that Prins, the French and the Russian section had criticized as impairing the rule of law, which should also apply to the treatment of insane offenders and mentally ill or deficient persons.[75] In retrospect, van Hamel gave a concise summary of the state of the debate:

> "[…] difficult and fundamental questions are still waiting their solution, especially this one: How far may legislation go in determining a state of dangerousness to the common safety (état dangereus, Gemeingefährlichkeit), which would justify the confinement of a person whether he be delinquent or not? On this subject there has been a very remarkable and lasting difference of opinion among the members of the Union; remarkable because it is connected with a difference of political and fundamental philosophical convictions. It is not by accident that especially the German members, led by von Liszt, are declaring themselves in favor of rigorous and determined though humane measures against this class of offenders. On the contrary, the French Group, represented by its leaders Gabriel Tarde, Garcon, and Garraud, seconded by the Russians (liberals in their country), and others, have maintained the necessity of respecting the rights of the individual and of safeguarding them against elastic formulas or arbitrary confinements. This controversy also crops out in the discussions, when the German school recommends for habitual criminals an indeterminate preventive confinement after the expiration of the prison term, while the other parties declare this preventive confinement to be contrary to the social and ethical conception of 'punishment'."[76]

6. The revision of the German penal code

The treatment of dangerous mentally ill persons, insane offenders and dangerous criminals, the concept of diminished criminal responsibility, and a dual system of punishment and security measures were important and controversial issues in the

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[73] *Mitteilungen der IKV* 17 (1910), p. 495; English translation: Smithers, W.W., "1910 Meeting of the International Union of Penal Law", *Journal of Criminal Law and Criminology* 2 (1911)", pp. 381-385, quote p. 384; cf. Wetzell, "About the concept of the 'dangerous individual'", p. 137.

[74] For the controversial debate on dangerousness see: Wetzell, R.F., "Franz v. Liszt und die internationale Strafrechtsreformbewegung", *Die Schule Franz von Liszts. Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts* (A. Koch, M. Löhnig, eds.), Tübingen, 2016, pp. 207-227, here pp. 216-222; Wetzell, "About the concept of the 'dangerous individual'".

[75] Cf. Wetzell, "About the concept of the 'dangerous individual'", pp. 138-140; Bellmann, *Internationale Kriminalistische Vereinigung*, p. 112.

[76] Hamel, J.A.v., "The International Union of Criminal Law", *Journal of the American Institute of Criminal Law and Criminology* 2 (1911), pp. 22-27, quote p. 26.

discussions regarding the revision of the German penal code.[77] The compromise that the *IKV* had reached was rather vague and left the further development to the 'système allemand' and national legislation. The direct impact of the proposals the *IKV* had adopted in 1904 and 1905 was thus rather limited. The jurists and the judicial administration entrusted with the revision of the penal code neglected a specific criminal law on insane offenders, criminal responsibility and security measures. In 1906 the *Reichsjustizamt* appointed a new commission to revise the German penal code in which von Liszt and Kahl were no longer members and which was composed of administrative and judicial officials. The preliminary draft of the penal code published by this by the reform commission in 1909 only adopted the concept of diminished criminal responsibility of insane offenders, the obligatory mitigation of punishment and the indeterminate custody/preventive detention of dangerous (insane) offenders with diminished criminal responsibility after serving a sentence. The draft retained free will as an essential criterion, as well as impunity in case of a total lack of criminal responsibility resulting from mental insanity (*geisteskrank*), debility (*blödsinnig*) or unconsciousness (*bewußtlos*).[78] The draft also included for the first time a dual system of penal sanctions and security measures (*Sicherheitsverwahrung*) in institutions such as mental asylums, workhouses (*Arbeitshaus*) and detoxification institutions (*Trinkerheilanstalt*).[79]

Von Liszt appreciated that the draft had introduced diminished criminal responsibility and security measures, but also criticized that the provisions did not use a clearly defined concept of mental insanity, which in his opinion should also include dangerous mentally ill persons, obligatory punishment and subsequent security measures.[80] Together with Wilhelm Kahl, Karl von Lilienthal and James Goldschmidt, von Liszt published a 'private' alternative draft (*Gegenentwurf*). In it, they demanded that the state of mental deficiencies/illness should be defined more precisely, that free will as an essential criterion for criminal responsibility should be substituted by the cognitive ability to perceive a criminal action, and that the mitigation of punishment should not be obligatory but optional and proportionate to the dangerousness of the offender. The *Gegenentwurf* also proposed that subsequent security measures be extended to all dangerous offenders, who could be put under *Schutzaufsicht* (protective surveillance) after serving a sentence. Likewise, insane offenders who were not evaluated as dangerous to society (*gemeingefährlich*) but as inferior and therefore having a criminal inclination

[77] Summarized in Wilmanns, K., *Die sogenannte verminderte Zurechnungsfähigkeit als zentrales Problem der Entwürfe zu einem Deutschen Strafgesetzbuch*, Berlin, 1927, pp. 1-14. See also Liszt, F.v., "Zur Vorbereitung des Strafgesetzentwurfs", *Festschrift für den XXVI. Deutschen Juristentag*, Berlin, 1902, pp. 57-86; Liszt, "Revision des Strafgesetzbuches", pp. 356-410; Liszt, F.v., "Die 'Sichernden Massnahmen' in den drei neuen Vorentwürfen", *Archiv für Rechts- und Wirtschaftsphilosophie* 3 (1909/1910), pp. 610–620.

[78] *Vorentwurf zu einem Strafgesetzbuch für das Deutsche Reich,* ed. Reichsjustizamt, 2 vol. Berlin 1909 §§ 63-65, § 63 "Geistige Mängel", p. 16: "Nicht strafbar ist, wer zur Zeit der Handlung geisteskrank, blödsinnig oder bewußtlos war, so daß dadurch seine freie Willensbestimmung ausgeschlossen wurde. War die freie Willensbestimmung durch einen der vorbezeichneten Zustände zwar nicht ausgeschlossen, jedoch in hohem Grade vermindert, so finden hinsichtlich der Bestrafung die Vorschriften über den Versuch (§ 76) Anwendung"; modern edition: Vormbaum, T. / Rentrop, K. (eds.), *Reform des Strafgesetzbuchs. Sammlung der Reformentwürfe, Bd. 1: 1909 bis 1919*, Berlin, 2008, pp. 1-62; cf. Wetzell, "Penal reform in imperial Germany", pp. 59-62.

[79] *Vorentwurf zu einem Strafgesetzbuch* §§ 42, 43, 65; cf. Stisser, D.T., *Die Sicherungsverwahrung - de lege lata et de lege ferenda*, Baden-Baden, 2019, pp. 23 ss.

[80] Liszt, F.v., "Zum Vorentwurf eines Reichsstrafgesetzbuches", *Zeitschrift für die gesamte Strafrechtswissenschaft* 30 (1910) pp. 250-278.

(*geistige Minderwertige*) should be subjected to subsequent custody/institutionalization and or put under *Schutzaufsicht*.[81]

To some extent, the *Reichsjustizamt* reacted to criticism by von Liszt and other protagonists of criminal jurisprudence, and in November 1911 established a new reform commission with three members of the 'compromise group' who also belonged to the positivist criminology network: Wilhelm Kahl, Robert von Hippel and Wilhelm Frank.[82] This commission elaborated a further draft (1913, published in modified form in 1919) which, however, retained the established basic principles: diminished criminal responsibility with mandatory mitigation of punishment and subsequent indeterminate security measures (*Sicherheitsverwahrung*) against insane offenders with no or diminished criminal responsibility; the authority to decide rested with the criminal judge. Not included were security measures such as preventive detention/custody and incapacitation based only on dangerousness, insanity or inferiority.[83] In this regard, von Liszt's concept of mental insanity and mentally insane persons who posed a future danger to the public (*gemeingefährliche Geisteskranke)* and therefore should be put in preventive indeterminate custody and therapy to protect society was not adopted. The final consequence of his concept of *Zweckgedanke, Zweckstrafen* and offender typology was the implementation of a "*System der gesellschaftlichen Schutzmassregeln, der mesures de la défense*" against insane offenders and dangerous mentally ill persons – *geisteskranke Verbrecher* and *gemeingefährliche Geisteskranke that* failed.[84] After 1911, von Liszt withdrew from taking an active role in the reform process, and only a few protagonists of the positivist criminology network. such as Wilhelm Kahl and Gustav Radbruch, participated in the revision of the subsequent drafts, which regarding diminished criminal responsibility and security measures kept the provisions of the 1913/1919 draft.[85] However, none of them ever entered into force, and it was the Nazi regime that enacted in November 1933 the law concerning *gefährliche Gewohnheitsverbrecher* and security measures that in addition to punishment introduced obligatory indeterminate custody/preventive detention (*Sicherungsverwahrung*) and other security measures (including sterilization) against all those deemed dangerous habitual criminals, including insane offenders with diminished criminal responsibility.[86]

7. Conclusions

[81] Kahl, W. / Lilienthal, K.v. / Liszt, F.v. / Goldschmidt, J., *Gegenentwurf zum Vorentwurf eines deutschen Strafgesetzbuchs, Bd. II: Begründung,* Berlin, 1911, §§ 13, 14 and 60, pp. 11-18 and 85 s.; modern edition: Vormbaum / Rentrop, *Reform des Strafgesetzbuchs*, pp. 63-126.

[82] Vormbaum / Rentrop, *Reform des Strafgesetzbuchs*, pp. XV-XVIII; Wetzell, "Penal reform in imperial Germany", pp. 64 s.

[83] Modern edition: Vormbaum / Rentrop, *Reform des Strafgesetzbuchs*, pp. 127-418; cf. Stäcker, *Die Franz von Liszt-Schule,* p. 71 s.

[84] Liszt, "Die 'Sichernden Massnahmen'", p. 617.

[85] Overwiew on the drafts and the influence of the 'von Liszt-school': Stäcker, *Die Franz von Liszt-Schule,* pp. 85-97.

[86] *Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung, 24. November 1933,* Reichsgesetzblatt I (1933), pp. 995-999; cf. Hellmer, J., Der *Gewohnheitsverbrecher und die Sicherungsverwahrung* 1934–1945, Berlin, 1961, pp. 133 ss.; Müller, C., Das *Gewohnheitsverbrechergesetz vom 24. November 1933. Kriminalpolitik als Rassenpolitik*, Baden-Baden, 1997; Stisser, *Die Sicherungsverwahrung*, pp. 25-27.

The issue of the insane offender was of particular relevance for von Liszt and the positivist criminology network in promoting a reform of criminal law regarding the implementation of diminished criminal responsibility and a dual system of judicial punishments and security measures. The *IKV* functioned to integrate experts in forensic psychology and forensic sciences (*Criminalpsychologie und Kriminalistik*) and thus made possible an interdisciplinary discourse of juridical and medical experts in intertwined national and international arenas, which shaped the concepts of insane offenders (*geisteskranke Verbrecher*), dangerous mentally ill persons (*gemeingefährliche Geisteskranke)* and diminished criminal responsibility. The main significance of this discourse and of the positivist criminology network and the *IKV* respectively was to negotiate a compromise between the approaches of juridical and medical experts (or disciplines) as well as between the dogmatic-juridical differences of the classical and the modern school of German jurisprudence.

However, due to divergent opinions within the *IKV* – particularly concerning the punishment of insane offenders with diminished criminal responsibility and preventive security measures against mentally ill persons who had not committed a crime – the compromise was rather insubstantial and the direct impact on the revision of the German penal code was limited in the first instance. The classical jurisprudence as well as the reform commission and the *Reichsjustizamt* rejected the abrogation of free will as the essential criterion for criminal responsibility, the implementation of obligatory punishment and indeterminate security measures against insane offenders, legal incapacitation and preventive custody for *gemeingefährliche Geisteskranke.* They also declined the implementation of such concepts through a special criminal law, although von Liszt had rather half-heartedly modified his reform proposals to reach a compromise. The reasons for this are complex and not merely the result of the 'clash' of the 'modern school' of criminology with the 'classical school' of criminal law. To some extent, the full implementation of the concepts von Liszt and the compromise the *IKV* had developed was also impaired by the preservation of the juridical idea of the rule of law and the attitude that a national codification should be protected from non-juridical, interdisciplinary and international influences. It seems that German jurists – academics as well as practitioners in public administration – sought to maintain their predominance in criminal justice against the claims of positivist criminology and medical experts.[87]

Interestingly, the concepts of von Liszt and his close (German) associates showed a rather limited reception of empirical criminological research from other countries and from psychiatry/psychology.[88] Regarding insane offenders, the knowledge regime of positivist criminology was rather limited, and the debates and compromises stuck to the juridical conceptualization of (diminished) criminal responsibility based on free will and the problem of impunity.[89] In this context, insanity and mentally ill or deficient persons were merely considered from the angle of dangerousness, inferiority and habituality. Diminished criminal responsibility and insane offenders were conceptualized in relation to the typology of criminals and the defining categories of dangerousness, habituality (but without considering recidivism as the prime empirical factor) and inferiority. Von Liszt did not develop a legally applicable distinction between insane and sane offenders

[87] Cf. Wetzell, "Penal reform in imperial Germany", pp. 67 ss.

[88] For a similar conclusion see Wetzell, "About the concept of the 'dangerous individual'", pp. 143 ss.; Mayenburg, "Die Rolle psychologischen Wissens".

[89] Cf. Galassi, *Kriminologie im Deutschen Kaiserreich*, p. 423, 427 s.; Müller, *Verbrechensbekämpfung im Anstaltsstaat*, pp. 292 ss., 300.

regarding criminal responsibility, nor between insane offenders and dangerous mentally ill persons. Instead, he constructed a continuum (or greyzone) of insane, inferior, habitual and dangerous offenders that was characterized by the overlap of mental and moral insanity and an alleged criminal inclination/disposition. As a result, von Liszt and the positivist criminology network conceptualized insane offenders merely as *geisteskranke Verbrecher* or *gemeingefährliche Geisteskranke* and rather created labels of criminalization and narratives of a security discourse. In contrast, the psychological factors of the individual perpetrator and the medical dimension only played a role regarding the inclusion of mental therapy as an element of security measures. Hence, the function of psychiatrist/psychologist was reduced to providing a report or evaluation on the mental state of offenders subject to the authority of judges to decide on punishment, custody, incapacitation, guardianship or release.

As a consequence, von Liszt and the positivist criminology network demanded a differentiated dual system of judicial punishment and security measures, both with the option of indeterminate sentences and regarding custody, institutionalization, therapy and legal incapacitation also as preventive security measures that could be imposed by a criminal court against *gemeingefährliche Geisteskranke* who were not guilty of a crime. Although this specific 'système allemand' (or rather 'système von Liszt') was widely rejected by many protagonists of the *IKV* and German 'classical jurisprudence', in the long run, some compromises developed by the positivist criminology network were incorporated into the reform of criminal law in Germany: diminished criminal responsibility with a focus on insane offenders, mandatory mitigation of punishment, and a dual system of judicial punishment and hybrid security measures, which included medical treatment and institutionalization in mental asylums as well as indeterminate custody/preventive detention (*Sicherheitsverwahrung*). However, these measures were not completely new nor were they the outcome only of positivist criminology. Indeterminate detention in institutions (poor houses, workhouses, sanatoriums) had already been used by both the administration and the police to control alcoholics, beggars, vagrants, prostitutes and other persons labelled as morally insane or habitual criminals. But positivist criminology did contribute to the inclusion of these already existing measures of social control into criminal law for the purpose of social defence.[90] This was in line with the overall development of von Liszt' ideas from criminal law to social defence and criminal policy. This development had already started with the concepts of *Zweckgedanke* and *Zweckstrafe/Sicherungsstrafe*, and after 1911 led to a situation in which his direct influence on the revision of the German penal code was no longer apparent.[91] This raises the question if positivist criminology in Germany was more a juridical-political (*kriminalpolitisches*) than a scientific movement in the sense of empirical criminology. Within positivist criminology, the correlation of an empirical approach and political ideas had become ambiguous in an age in which liberal criminal law and the rule of law were the main reference points of the reform of national criminal law. The example of insane offenders, criminal responsibility and security measures as crucial topics of positivist criminology demonstrates that the influence of the network around Franz von Liszt and the *IKV* on the revision of the German penal code was limited. It has also shown that the relation between international positivist criminology and the

[90] Wetzell, "Penal reform in imperial Germany", pp. 66 s.; Germann, U., "Toward New Horizons: Penal Positivism and Swiss Criminal Law Reform in the late 19th and early 20th Centuries", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 259-276 (available at http://www.glossae.eu), here p. 274; Cartuyvels / Cliquennois, "The Punishment of Mentally Ill Offenders", p. 20.

[91] Koch, "Der unbekannte Franz v. Liszt", pp. 482 ss.

national criminal law reform was characterized by collisions and contradictions which had a rather ambiguous effect on the development of constitutional liberal criminal law.[92]

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[92] For a comparable assessment see Pifferi, M., From Responsibility to Dangerousness? The Failed Promise of Penal Positivism, *The Limits of Criminological Positivism: The Movement for Criminal Law Reform in the* West, 1870-1940 (M. Pifferi, ed.), London / New York, 2022, pp. 255-279.

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